

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5163 of 1997

For Approval and Signature:

Hon'ble THE ACTING CJ R.A.MEHTA and  
MR.JUSTICE N.N.MATHUR

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1. Whether Reporters of Local Papers may be allowed  
to see the judgements? Yes
2. To be referred to the Reporter or not? Yes
3. Whether Their Lordships wish to see the fair copy  
of the judgement? No
4. Whether this case involves a substantial question  
of law as to the interpretation of the Constitution  
of India, 1950 of any Order made thereunder? No
5. Whether it is to be circulated to the Civil Judge?  
No

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HAREN PANDYA

Versus

STATE OF GUJARAT

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Appearance:

MR YN OZA for Petitioner  
Mr.S.N.SHELAT, Addl.AG & Mr.P.G.DESAI,GP  
for Respondent No. 1  
MR PR NANAVATI for Respondent No. 2  
NANAVATI & NANAVATI for Respondent No. 3  
MR S.H. Sanjanwala with RS SANJANWALA  
for Respondent No. 4

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CORAM : THE ACTING CJ R.A.MEHTA and

MR.JUSTICE N.N.MATHUR

Date of Order: 17 /10/97

CAV ORDER : (Per R.A. Mehta, Actg CJ)

1. This matter was fully heard at the admission stage and we had started dictation in open Court on 11th September 1997 and had indicated that the petition was being dismissed. However, on that day, the judgment could not be fully dictated and thereafter it could not be dictated due to other work and the Bench had separated and, therefore, the judgment was reserved.

2. The petitioner, by way of this Public Interest Petition, has prayed that the decision of respondent authorities - Gujarat Maritime Board and the State Government to enter into a joint venture with respondent no.3, Anchor Consortium with respect to Positra Port be quashed and set aside and respondents nos. 1 and 2 be restrained from executing any document including Memorandum of Understanding in favour of the respondent no.3.

3. In 1995, the Port Policy (Annexure 'A') was announced by the Gujarat Maritime Board. In the introduction, it is mentioned: Gujarat has a coastline of nearly 1600 KMs and is the nearest maritime outlet to Middle East, Africa and Europe. In 1991, Government of India initiated various economic, trade and industrial reforms, though the policy of liberalisation to enhance industrial and trading activities. The Gujarat State had taken up the policy of liberalisation and privatisation through a process of globalization. Gujarat is experiencing a phenomenal interest in investments both from mega industrial sectors within the country and also from top multinationals abroad. Investments to the tune of \$ 30 billion were said to be in the pipeline and these investments are converging in and around potential port sites. The vast hinterland is also referred to as potentially beneficial. Against this future potential, at present, the ports were being planned totally in isolation, without taking into consideration the requirements of industry, trade and commerce and no integrated plan existed to create ports of international design and status, linked with hinterland with multi-channel roads that carry cargo efficiently and other related infrastructure.

4. The new port policy is, therefore evolved with the objects and strategies, which include development of new port sites. Gujarat Maritime Board identified 10 green field sites for development as direct berthing deep water ports. Looking to the location and generation of cargo, each port has been earmarked for specific commodities. Positra is one of the 10 sites and it is

described as follows :

"Positra, situated near intermediate port of Okha, is at the entrance of Gulf of Kutch having natural protection from south-west monsoon conditions. It will consist of Positra-I, an exclusive modern container port at the historic Dwarka Beyt Island with 12 mtrs. draft. Positra-II will be a petroleum and coal port with a draft of 18 mtrs. The nearest railway broad gauge link is only 15 kms. from the port site."

Out of the identified 10 ports, 4 ports are to be developed by the State Government and remaining 6 are left open totally for private sector. The policy regarding port reads as follows :

"The following ports will be developed by Gujarat Maritime Board alongwith consortium of State Government public sector and/or consortium of private sector companies.

1. Rozi (Bedi) :Agriculture port
2. Positra :Container & petroleum port
3. Dahej :Industrial port
4. Mundra :General cargo port.

Gujarat Maritime Board will initiate a techno-economic feasibility study on these port locations and would undertake the construction of wharf/ jetty/ quay and its maintenance. The superstructures like handling facilities and on-shore facilities in the form of warehousing, tank farms, etc. will be privatised. Preference will be given to State Government and Central Government organisations on a negotiable basis. The remaining facilities for privatisation will be done by inviting tender bids. An initial premium will be charged for the land and wharf facility and an annual lease rent would also be stipulated. The detailed terms and conditions for privatising these services will be finalised by Gujarat Maritime Board."

It is further provided that ;

"These port locations are to be given on BOMT (Build, Operate, Maintain and Transfer) basis. The investment in infrastructure projects like ports being capital intensive, with higher gestation period compared to other sectors of investment, Government of Gujarat is very particular that the port projects taken up by private entrepreneurs should be a profitable proposition to them. The viability of port project depends upon the location, the maritime conditions, scale of investment and the kind of cargo to be handled. The port project has to be assured at a reasonable rate of return after accounting for capital recovery and interest repayment. Hence, it is essential that each port project is evaluated based on an investment analysis; consisting of capital cost, revenue receipts, revenue expenditure and capital recovery. Gujarat Maritime Board will study the financing pattern adopted by the World Bank and the Asian Development Bank and other Financial Institutions to evolve a comprehensive package."

5. The petitioner contends that respondent no.3 has been issued a letter of intent, and a Memorandum of Understanding for development of Positra port is also likely to be issued to the joint venture of Gujarat Maritime Board with respondent no.3, Anchor Consortium. It is submitted that this is grossly arbitrary and violative of Article 14 of the Constitution. It has been done without inviting public tenders. It is straightway and direct pick and chose of respondent no.3, joint venture partner. It is also submitted that respondent no.3 has been shown undue favour by the Chief Minister, respondent no.4 herein.

6. The petitioner has stated in para 11 of the petition that the petitioner does not object in any manner whatsoever to any clause or any part of the Port Policy, but what is called in question in the petition is the manner and method in which respondent no.3 has been picked up and chosen.

7. It is submitted that under the Policy of Port Development of Positra, even if it is taken up by a joint venture, it could have been done only by inviting offers of public tender. It is submitted that the policy itself prescribes inviting tenders. It is submitted that this Port is so strategically situated and is likely to be so lucrative that had public tenders been invited many

interested parties would have come up for having joint venture with the Gujarat Maritime Board. It is also submitted that for the 6 ports which are to be developed by private sector, the policy has been laid down. These ports will be privatised through global tender bids and in respect of these 6 ports, about 30 bids have been received.

For these 6 ports there is a policy of privatisation of these ports by global tender bids. But there is no such provision for the other 4 ports, which are to be developed in the joint sector. The policy laid is that these 4 ports are to be developed in joint sector by joint venture. Therefore, even though an express provision is made for the 6 ports to be privatised through global tenders, the same policy is not applicable for the other 4 ports. It is submitted by the respondent that these four ports fall within the sensitive zone; therefore, the Government and the Gujarat Maritime Board would not like to leave it totally to the private sector.

8. On behalf of the petitioner it is submitted that the policy lays down that Gujarat Maritime Board will initiate techno-economic feasibility study on these 4 port locations and will undertake construction of wharf/ jetty/ quay and its maintenance. It is, therefore, submitted that as far as these sites and development of ports is concerned it is not contemplated to be done by the joint venture and it was to be done by the Gujarat Maritime Board itself. Superstructures like handling facilities and on-shore facilities are admittedly to be privatised.

It is also mentioned that preference will be given to State Government and Central Government organisations on a negotiable basis. No Central or State Government organisation has come forward for this, nor any private sector company. The policy provides that these port locations are to be given on BOMT (Build, Operate, Maintain and Transfer) basis. It also states that investment in infrastructure projects being capital intensive with higher gestation period, Government of Gujarat was very particular that the port projects are taken up by private entrepreneurs by profitable proposition to them. It is, thus, clear that the port location is to be developed as a joint venture by Gujarat Maritime Board and consortium of private sector companies

on the basis of BOMT basis . This joint venture will build and construct port facilities, operate and maintain the same and at the end of period of 30 years transfer back the same to the Gujarat Maritime Board.

9. It is seen in this case that for the development of the port, the capital investment is to the tune of nearly Rs.900 crores and it is specialized kind of work where the entrepreneur has to build, operate and maintain the port location and transfer the same after the stipulated period.

10. The question is whether the requirement of inviting offers by public tender is to be applied in order to see that equal opportunity is afforded to the public at large or whether it is open to the authorities to negotiate with a party and arrive at a decision to enter into a Memorandum of Understanding for development of the port location.

11. The learned Counsel for the petitioner has submitted that the procedure of inviting bids by tender has to be adopted in order to give equal opportunity to all interested persons and parties. On behalf of the respondents, it is submitted that the tender is not the only method and having regard to the nature of the work namely development of ports in joint venture, tender could hardly be a feasible procedure. Both the sides have referred to some of the judgments of the Supreme Court and one judgment of a single Judge of this High Court. The judgment of the learned single Judge is directly on the point in respect of another port in Gujarat namely Pipavav. It is the case of Mahendra B.Shah Vs. State of Gujarat, 1992(2) GLH 93. After considering several Supreme Court judgments, the learned single Judge held that ordinarily competitive bids would be an ideal method. However, that is not the only method and is not the invariable rule. From the judgment of the Supreme Court in the case of Kasturi Lal Vs.State of J.& K., AIR 1980 SC 1992, the following observations are quoted:-

"The State may choose to do, if it thinks fit and in a given situation, it may even turn out to be advantageous for the State to do so, but if any private party comes before the State and offers to set up an industry, the State would not be committing breach of any constitutional or legal obligations if it negotiates with such party and

agrees to provide resources and other facilities for the purpose of setting up of industry. The State is not obliged to tell such party: 'Please wait,I will first advertise, see any other offers are forthcoming, and then after considering all the offers, decide whether I should let you st up industry.' It would be most unrealistic to insist on such procedure particular in an area like J & K which on account of historical, political and other reasons, is not yet industrially developed and where entrepreneurs have to be offered attractive terms in order to persuade them to set up an industry. The State must be free in such a case to negotiate with a private entrepreneur with a view to inducing him to set up an industry within the State and if the State enters into a contract with such entrepreneur for providing resources and other facilities for setting up an industry, the contract cannot be assailed as invalid as long as the state had acted bonafide,reasonably and in public interest. "

The learned single Judge concluded in para 12 as follows:-

"From the aforesaid observations, it becomes clear that the issuance of public advertisement and inviting people at large to offer their prices or to apply for entrustment of contract is not a absolute or an invariable rule.It is the say of the respondent State in its affidavit that the Joint Sector Partnership project is always based on mutual trust and confidence and after examining the investment capacity, experience,top executives available with the fourth respondent and other material the Government has decided to give approval to the proposal of the fourth respondent for development of Pipavav project in joint sector.It is also pointed out that the GIIC also follows the same pattern of equity capital of 26% with the GMB, 25% to the proposed party, 49% shares to be offered to the public. That is the standard pattern adopted by the GIIC in all Joint Sector Partnership enterprises.The very pattern is to be followed in the present case also and since the transaction is one which is based on confidence and mutual trust, inviting applications from public at large was not consistent with the attainment of the object. In fact,in joint sector partnership project an

advertisement is never resorted to or rarely resorted to. This position is clear from the affidavit in reply filed by AF Vyas, Chief Executive Officer of the GMB and by HP Jamdar, Secretary, R & B , Sachivalaya, Gandhinaga."

Para 13 of the judgment is also apposite because it deals with the port policy of GMB and the State Government and the joint venture for the development of Pipavav port. That para concludes the matter in favour of the respondents and against the petitioner.

12. On behalf of the petitioner, it is submitted that it is the judgment of the learned single Judge and it is not binding to the Division Bench and the question is required to be considered by the Division Bench independently. It is true that the single Judge judgment does not bind the Division Bench. However, we do not find that the view taken by the learned single Judge is erroneous. It is consistent with the Supreme Court judgments as well as the principles of transparency, fairness and open policy.

13. In the case of Dutta Associated Pvt.Ltd. Vs. Indo Merchantiles P.Ltd., 1997(1)SCC 53, it is held that the decision making process should be transparent, fair and open.

14. In the case of GD Zalani Vs. Union of India, 1995 Supp(2) SCC 512, the Supreme Court held that normal method of auction or inviting tender is not feasible when hitech technological tie up in a joint venture was to be evolved. Para 34 which is the conclusion of the Supreme Court is reproduced below:-

"We must reiterate that this was not a simple case of granting of lease of a government company, in which case the court would have been justified in insisting upon the authorities following a fair method consistent with Article 14 i.e. by calling for tenders. We agree that while selling public property or granting its lease, the normal method is auction or calling for tenders so that all intending purchasers/ lessees should have an equal opportunity of submitting their bids/ tenders. Even there, there may be exceptional situations where adopting such a course may not be insisted upon.



Be that as it may, the case here is altogether different. HAL was trying to improve not only the quantum of production but also its quality and for that purpose, looking for an appropriate partner. They went in for the best. It must be remembered that this technology is not there for the mere asking of it. All the leading drug companies keep their processes and technology a guarded secret. Being businessmen, they like to derive maximum profit for themselves. It is ultimately a matter of bargain. In such cases, all that need be ensured is that the Government or the authority, as the case may be, has acted fairly and has arrived at the best available arrangement in the circumstances. "

The present case is a case of development of a port of capital intensive nature and the investment is estimated to be near about Rs.900 crores. In such cases, it would not be feasible to have competitive bidding.

15. In the case of New Horizons Ltd. and anr. Vs. Union of India and ors., 1995 (1) SCC 478, the Supreme Court held that even in cases where the Government action must be in consonance with the standards or norm which should not be arbitrary, irrational or irrelevant, it is entitled to have certain measure of "free play in the joints".

In view of the aforesaid, we agree with the reasoning and conclusions of the learned single Judge in Pipavav port case that competitive bidding and invitation of tenders is not feasible and not necessary in case of joint venture for development of ports.

16. In the present case, the port policy of 1995 is a publicly declared policy and the policy had received further circulation amongst the highly relevant quarters in Exim India 1997 Multimodal Expo 1997 organised at World Trade Centre, Mumbai in January and February 1997. It was sponsored by Indian Ports Association, Western India Shippers Association and Multimodal Transport Association. The port development project is a mega project and for such a project, it might be necessary even to attract the entrepreneurs by invitation, but in any case, when anybody has come with a proposal, it is not at all necessary as the Supreme Court held in Kasturi Lal's case (supra) to tell him "Please wait, I will have to

first advertise". This is not practicable and developmental business approach, but it is a negative and bureaucratic approach. The Supreme Court has not approved such negative approach.

17. In para 9 (a) of the petition, it is contended that the present consortium partner namely Anchorwala Consortium is not competent and has failed in Pipavav project. It is submitted that even after five years and more, the said port has not been developed at all and at least more than 50% conditions laid down in the MOU for development of Pipavav port remained incomplete. This statement has been made without particulars. However, this has been replied by the respondent GMB in para 12 of its affidavit-in-reply (page 55) and it has been stated as under:-

"In fact, the Pipavav port project in a joint sector has been a successful venture and is going on in full swing where two jetties are already in operation and two more jetties are likely to be put into operation by the end of this year and 750 mtrs. of berth length will be available for operation. It is also planned to have separate LPG and LNG terminals at this port and on an average 5 to 6 ships are being handled every month at Pipavav port as on today and with the modernisation of mechanical handling facilities in the last quarter of this year, the traffic is likely to increase substantially in comparison with previous year and therefore it is absolutely baseless to say that the government has failed in granting Pipavav port to a private party as sought to be alleged."

In the affidavit-in-reply of the third respondent also, in para 20, the averment is denied and the progress of the development of Pipavav port is mentioned.

18. The petitioner has also submitted that a very lucrative project has been given away in an illegal and arbitrary manner to favour the third respondent. Financial Internal Rate of Return (FIRR) of the development of Positra port has been produced and it is shown that it is 5.69% only. It is submitted that it is on account of the capital incentive nature and long period of gestation. Such FIRR of all other ports are also produced and Positra would be a port having comparatively low return. Therefore, there is no merit in the petitioner's contention.

19. In view of the aforesaid discussion, we do not find that there is any merit in this petition. Hence, the petition is dismissed. Notice discharged with costs.

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The learned Counsel for the petitioner prays that status quo may be continued for six weeks to enable the petitioner to approach the Supreme Court and obtain appropriate interim order. In the facts and circumstances, we do not think that this request can be granted. Hence rejected.

(R.A.Mehta,Actg.C.J.)

(N.N.Mathur,J.)